

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Chairman;
Mark Acton, Vice Chairman;
Tony Hammond; and
Nanci E. Langley

Statutory Review of the System
for Regulating Rates and Classes
for Market Dominant Products

Docket No. RM2017-3

ORDER DENYING MOTION FOR RECONSIDERATION

(Issued February 24, 2017)

I. INTRODUCTION

On February 6, 2017, MPA—The Association of Magazine Media and the Alliance of Nonprofit Mailers (together, Joint Movants) filed a motion for reconsideration of the Commission order that denied Joint Movants' motions to issue information requests.¹ For the reasons given below, the Commission denies the Motion.

¹ Motion of MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers for Reconsideration of Order No. 3763, February 6, 2017 (Motion); see Order on Motions for Issuance of Information Requests, January 30, 2017 (Order No. 3763); see also Motion of MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers for Issuance of Information Requests, January 17, 2017; Second Motion of MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers for Issuance of Information Requests, January 25, 2017 (together, Information Request Motions).

II. PROCEDURAL HISTORY

The factual background prior to this decision is set forth in Order No. 3763, which is the subject of the instant Motion. Order No. 3763. In summary, the Joint Movants filed two motions for the issuance of information requests pursuant to 39 C.F.R. § 3001.21(a), which the Commission denied on January 30, 2017.²

Motion. On February 6, 2017, the Joint Movants filed their Motion. The Joint Movants advance three reasons why the Commission should reconsider its decision in Order No. 3763.

First, the Joint Movants contend that the Administrative Procedure Act (APA) requires the Commission to obtain the information requested in the Information Request Motions before deciding whether the current regulatory system satisfies 39 U.S.C. §§ 3622(b)(1), (5), and (8). Motion at 1. Specifically, the Joint Movants argue that the Commission cannot satisfy the standards of the APA without the information they seek. *Id.* at 4-6. The Joint Movants then explain why the information previously sought is necessary and allege that the Commission “does not dispute the relevance of any of the requested information.” *Id.* at 6-7.

The Joint Movants further argue that not obtaining the information sought in the Information Request Motions would violate 5 U.S.C. § 706(2)(A) “by departing arbitrarily from well-established Commission practice in other informal proceedings.” *Id.* at 8. The Joint Movants cite dockets in which the Commission has issued information requests and state that “[t]he Commission has provided no cogent reason for abandoning this well-established practice in the present docket.” *Id.* at 9. The Joint Movants then claim that “a failure to issue party-initiated information requests in this case may be found so arbitrary a departure from well-establish[ed] Commission practice that the reviewing

² Information Request Motions; Order No. 3763 at 3-4.

court may order discovery outright, rather than leaving the choice of information-gathering procedure to the Commission's discretion on remand." *Id.* at 11.

Second, the Joint Movants allege that without the information sought in the Information Request Motions, any Commission determinations made in phase 1 would be invalid, which, they assert, would mean the Commission could not proceed to phase 2. *Id.* at 12. The Joint Movants state that "[a] phase 1 proceeding conducted without the requested information would be an idle exercise, a non-binding dress rehearsal for the performance of phase 1 that actually counted." *Id.*

Third, the Joint Movants state that the Commission should reconsider Order No. 3763 now, rather than deferring until the end of phase 1. *Id.*

Statement in support of Motion. On February 7, 2017, the Association for Postal Commerce (PostCom) filed a statement in support of the Motion.³ PostCom states that informed decision-making requires that the Commission obtain the information sought by the Joint Movants and allow interested persons to comment on such information. Statement at 1.

Postal Service's response in opposition. On February 10, 2017, the Postal Service filed its response to the Motion.⁴ The Postal Service offers three reasons why the Joint Movants' Motion should be denied.

First, the Postal Service argues that the Joint Movants misinterpret Order No. 3763 as absolutely refusing to issue the information sought by the Joint Movants in phase 1. Opposition at 1-2. Rather, the Postal Service explains that the Commission could issue information requests "at any time it deems necessary." *Id.* at 3. In addition, the Postal Service argues that despite the Joint Movants' argument to the contrary, "a decision that information requests are not needed to issue a valid phase 1 determination would be well within the Commission's authority to make." *Id.*

³ Statement of Support of the Association for Postal Commerce for the Motion of MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers for Reconsideration of Order No. 3763, February 7, 2017 (Statement).

⁴ Opposition of the United States Postal Service to Motion for Reconsideration of Order No. 3763, February 10, 2017 (Opposition).

Second, the Postal Service argues that the Commission's approach is consistent with Commission practice. *Id.* at 4. The Postal Service disagrees with the Joint Movants' assessment that the Commission is arbitrarily abandoning a well-established practice of automatically granting motions for the issuance of information requests. *Id.* The Postal Service argues that Joint Movants' preemptive attack on any phase 1 decision "that is not based on immediate issuance of their desired information requests as arbitrary and capricious" is contrary to "black-letter case-law." *Id.* The Postal Service explains that a court gives an agency "broad deference in determining how and when to build a factual record." *Id.*

In addition, the Postal Service observes that "nothing in the Commission's rules or practice establishes a party's absolute entitlement to get its questions asked and answered, much less on its preferred schedule, in an informal rulemaking." *Id.* at 6. The Postal Service goes on to state that "Commission practice supports its wholesale discretion over whether and when to issue information requests (including those proposed by parties), based on the Commission's assessment as to what is necessary in order to efficiently and effectively conduct its proceeding." *Id.*

The Postal Service further argues that "it is entirely consistent with the general nature of an ANPR stage for the Commission to defer any fact-finding until after the filing of comments." *Id.* at 7. The Postal Service then details multiple situations in which the Commission has not propounded questions sought in a motion for issuance of an information request or has not made a formal ruling when a movant has sought issuance of an information request. *Id.* at 8.

Third, the Postal Service argues that the Joint Movants add no substantial justification for the immediate issuance of their proposed information requests. *Id.* at 9. The Postal Service contends that the Joint Movants "have not met their burden of why their proposed information requests are necessary, in light of the publicly available information and the questionable relevance of the proposed information requests themselves." *Id.* at 19.

III. COMMISSION ANALYSIS

In consideration of the arguments set forth in the Joint Movants' Information Request Motions, the instant Motion, the Statement, and the Opposition, the Commission concludes that none of the asserted grounds for reconsideration have merit.

The Joint Movants' first contention is that the Commission cannot satisfy the standards of the APA without the information sought in the Information Request Motions. Motion at 4-6. The Joint Movants cite several sources for the proposition that an agency decision may be arbitrary and capricious if there is no rational connection between the facts before the agency and agency's decision. *Id.* at 5-6.

The Joint Movants, however, have failed to provide sufficient legal justification to support the notion that an agency would be in violation of the APA for failing to allow specific discovery during a rulemaking proceeding. In general, 5 U.S.C. § 553 establishes the maximum procedural requirements that Congress was willing to have a court impose upon a federal agency in conducting a rulemaking proceeding, and while it is within an agency's discretion to grant additional procedural rights, a reviewing court is generally unable to impose them if an agency has not chosen to grant them.⁵ In addition, even apart from the APA, the formulation of procedures should generally be left to the agency's discretion. *Vermont Yankee Nuclear Power Corp.* at 524. Moreover, the Joint Movants have not demonstrated how the Commission is required to afford *them* the information sought in the Information Request Motions for the Commission to be in conformance with the APA. The Commission notes that the instant proceeding involves a review of the prior ten years of experience under the existing market dominant rate and classification system. See Order No. 3763 at 3. The Joint Movants, and any other party that wishes to comment, may make any arguments

⁵ See *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523-524 (1978).

they deem appropriate based on a wealth of information publicly available in the Commission's filing system, the Postal Service's reports, and elsewhere.

As set forth in Order No. 3763, the Commission views this stage of the proceeding as an opportunity for the Commission to seek and consider public comment prior to making its initial determinations of whether the system is meeting the objectives, considering the factors.⁶ The Commission has not made any determinations as to whether the ratemaking system is achieving its objectives, taking into account the factors as it will be required to do, following notice and an opportunity for comment. See 39 U.S.C. § 3622(d)(3). If the Commission concludes that expanding the record is required to aid in making these determinations or, if necessary, to evaluate potential changes to the system, it will undertake to do so at that time. As this proceeding was initiated as an advanced notice of proposed rulemaking proceeding, interested persons will have the opportunity again in the proposed rulemaking phase, in the event the Commission recommends any changes to the existing system, to weigh in on what changes they believe would best achieve the statutory objectives.

The Joint Movants further allege that not obtaining the information sought in the Information Request Motions would be an arbitrary departure from established Commission practice. Motion at 8. The Postal Service is correct that nothing in the Commission's rules entitles a party to information requests in rulemaking proceedings. See 39 C.F.R. part 3001; see *also* Opposition at 6. Both the Joint Movants and Postal Service have identified Commission dockets where information requests have and have not been issued. Motion at 9; Opposition at 6-8. However, the Postal Service is correct in that the decision whether and when to issue information requests is within the Commission's sole discretion.

⁶ Order No. 3763 at 3; *compare* 39 U.S.C. § 3661(c) (which provides for a hearing on the record in dockets concerning a change in the nature of postal services) *with* 39 U.S.C. § 3622(d)(3) (which prescribes no specific format for the review of the system for regulating rates and classes for market dominant products).

As explained in Order No. 3763, the Commission will consider requesting additional information if it determines that additional information is necessary to facilitate its review. Order No. 3763 at 3. However, the Commission did not contemplate discovery within this proceeding, and its view remains unchanged at this time.⁷ See *id.*

Furthermore, the Commission finds the Joint Movants argument that “a failure to issue party-initiated information requests in this case may be found so arbitrary a departure from well-establish[ed] Commission practice that the reviewing court may order discovery outright, rather than leaving the choice of information-gathering procedure to the Commission’s discretion on remand” unsupported. See Motion at 11. As the Joint Movants tacitly acknowledge, both cases cited by the Joint Movants discuss only the theoretical application of court-ordered rulemaking procedures. As the context of these cases makes clear, given the deference accorded to an agency to fashion its own procedural rules, it is unlikely that a court would order the discovery desired by the Joint Movants.⁸

For example, in *Vermont Yankee Nuclear Power Corp.*, the intervenor argued that the decision to preclude discovery or cross-examination denied it a meaningful opportunity to participate in agency proceedings. See *Vermont Yankee Nuclear Power Corp.* at 541. Although the Court of Appeals for the D.C. Circuit did not impose a new procedural format on the agency, it did conclude the procedures afforded during the proceedings were inadequate. *Id.* at 541-542. The Court, however, stated “we feel compelled to address the opinion on its own terms, and we conclude that it was wrong.” *Id.* at 542. The Court acknowledged that it has stated in prior opinions that in *some* circumstances additional procedures may be required in order for due process to be satisfied. *Id.* The Court also stated, as the Joint Movants cite, “that a totally unjustified departure from well-settled agency procedures of long standing might require judicial

⁷ Persons are always free to request that the Commission request information from the Postal Service, however, there is no absolute right to discovery in any Commission proceeding. See 39 C.F.R. § 3001.21.

⁸ See *id.*; see also *Vermont Yankee Nuclear Power Corp.* at 542; *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, at 308 n.1 (1st Cir. 1979).

correction.” *Id.*; see Motion at 11. However, the Court unequivocally stated that it was clear that absent constitutional constraints or extremely compelling circumstances, an agency should be free to fashion its own rules of procedure. *Id.* at 43.

The Joint Movants’ second argument is that any proceeding conducted without the requested information would be redundant and wasteful because without the requested information the Commission cannot make a valid determination regarding the extent to which the current system of regulation satisfies 39 U.S.C. §§ 3622(b)(1), (5), and (8). Motion at 11-12. Joint Movants appear to argue that the record for the Commission’s review, at this ANPR phase of the proceeding, could not possibly be sufficient without the Commission allowing their proposed discovery. At this phase of the proceeding, ample information is publicly available for parties to formulate comments and arguments concerning how, in their experience and understanding, the current market dominant system of regulating rates and classifications has worked to achieve the objectives of 39 U.S.C. § 3622(b), taking into account the factors of 39 U.S.C. § 3622(c).⁹ Further, if during the Commission’s review (whether independently or after consideration of arguments or ideas presented in parties’ comments) the Commission determines that additional information would be beneficial for the Commission to make its statutorily-required finding, it will request such information as necessary.

To the extent Joint Movants’ argument could be construed to hamper their ability to suggest alternatives for improving the system, the Commission considers that argument premature as the Commission has not yet made any determinations whether the ratemaking system is achieving its objectives and the Commission will consider requesting additional information if it determines that additional information is necessary

⁹ The Postal Service notes a significant amount of information related to the Joint Movants’ requests is publicly available. See Opposition at 10-11; Response of the United States Postal Service in Opposition to MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers’ Motion for Issuance of Information Requests, January 24, 2017, at 3, 5.

to facilitate the potential development of proposed rules to modify the system. See Order No. 3763 at 3.

The Joint Movants' third argument is that the Commission should reconsider Order No. 3763 now, rather than deferring until the end of phase 1. Motion at 12. In this Order, the Commission considers the Joint Movants' Motion.

IV. CONCLUSION

The Motion presents no arguments that warrant reconsideration of Order No. 3763. Therefore, the Motion is denied.

V. ORDERING PARAGRAPH

It is ordered:

The Motion of MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers for Reconsideration of Order No. 3763, filed on February 6, 2017, is denied.

By the Commission.

Stacy L. Ruble
Secretary